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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 463

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION; THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION; AND THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,
Petitioners,

vs.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR; FRANK A. THOMPSON, TRUSTEE, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR; AND BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Statement	1-4
The Southwestern Roads' Petition for Certiorari.	2
The Central Roads' Petition for Certiorari	3
Argument	5
Reply to the several sections of Respondents' Brief:	
Statement—Respondents' Brief in Opposition—Pages 1-2	6
Questions Presented—Respondents' Brief in Opposition—Pages 2-3	7
I. Respondents' Brief in Opposition—Pages 4-5	8
II. Respondents' Brief in Opposition—Page 6	12
III. Respondents' Brief in Opposition—Pages 6-7	12
IV. Respondents' Brief in Opposition—Pages 7-8	14
V. Respondents' Brief in Opposition—Pages 9-11	15
VI. Respondents' Brief in Opposition—Pages 11-12	16
VII. Respondents' Brief in Opposition—Pages 12-14	16

Cases Cited.

Southern Railway Company v. United States, (1944) 322 U. S. 72, 88 L. Ed. 1144	8
Southwestern—Official Divisions Case, 216 I. C. C. 687, (1936); 234 I. C. C. 135 (1939)	7
Terminal R. R. Association v. United States, (1924) 266 U. S. 17	14

Statutes Cited.

Federal Declaratory Judgments Act, Judicial Code, Sec. 274d, 28 U. S. C. A. Sec. 400	8
Land Grant Act, 43 Stat. L. 486, 10 U. S. C. A. Sec. 1375	8, 13
Section 22, Interstate Commerce Act, U. S. Code, Title 49	16

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STATEMENT.

As both groups of roads are now petitioners and respondents, the Baltimore and Ohio, the New York Central and the Pennsylvania, appellees below and petitioners in No. 463, will sometimes be referred to as the Central roads, and the Missouri Pacific, the St. Louis-San Francisco and

the St. Louis Southwestern, appellants below and petitioners in No. 552, as the Southwestern roads. This is the Central roads' reply to the brief in opposition; their brief in opposition to the Southwestern roads' petition in No. 552 will be filed promptly.

The Southwestern roads' brief in opposition seems designed to serve also as a preface to their own petition, and it may be useful, therefore, to state very briefly, and in one place, the opposing contentions in the Circuit Court of Appeals which this Court is asked to review by the respective petitions for certiorari.

The Southwestern Roads' Petition for Certiorari.

Until recently the Southwestern roads recognized that the ownership and distribution of revenue derived from the handling of Government freight under land grant equalization agreements was governed by the terms of the several individual agreements with the Government. "For over thirty years each of the parties to this case, regardless of which were the collecting or settling carrier, carried [bore] the land grant deduction in the territory served by it." (Opinion of District Court, R. 1664.) When the Southwestern roads changed their practice, it was on the asserted ground that they were warranted in doing so by changes in the equalization agreements (Opinion, R. 1664).

Only six weeks before this suit was brought, counsel for one of the respondents,[1] groping around for some means to defeat the clear limitations stated in the Central roads' equalization agreements, and to force those roads to bear part of the land grant deductions accruing in the southwest, conceived the idea of contending that more than

[1]Letter of M. G. Roberts, General Counsel, St. Louis-San Francisco Railway Company, of September 24, 1943, to counsel for the Central roads (R. 463).

three years before, the traffic officers of the several roads had entered into a contract agreeing to distribute revenues derived through equalization agreements, on the basis which had been prescribed by the Interstate Commerce Commission for the division of commercial rates. (See opinion of District Court, R. 1708-1709.)

No one had ever before suggested the existence of such an agreement. In a long opinion (R. 1660-1731) reviewing the record, the District Judge held that the alleged agreement had never been made and that the evidence establishing that fact was overwhelming.[1] The Court of Appeals held that conclusion of the District Court to be "abundantly sustained by the evidence." (R. 1794.)

In short, the Southwestern roads sought to prove an agreement fixing the ownership of land grant revenues on a different basis from that stated in the equalization agreements. The District Court who saw the witnesses and heard the evidence found as a fact that the parties never entered into the alleged agreement, and the Court of Appeals affirmed. Shorn of all embellishments, what the Southwestern lines ask in No. 552 is simply that this Court review the conclusion of both courts below that respondents had failed to prove the making of the contract on which they rested their entire case.

The Central Roads' Petition for Certiorari.

By their answer and prayer for declaratory judgment, the Central roads denied the existence of the agreement alleged in the complaint, and asked the court to adjudge and declare that the Central roads are not obliged to bear any land grant deductions other than those specifically equalized by them in their several, individual equalization agreements with the Government. The District

[1]See also Findings of Fact 36 to 40, inclusive, R. 1722-1724; Conclusions of Law 2 to 7, inclusive, R. 1727-1729.

Court so held. The Court of Appeals modified the decree of the District Court by eliminating the affirmative relief granted the Central roads and, as thus modified, approved the decree. The court then denied a motion to reconsider that feature of its judgment, with one judge voting to grant the Central roads' petition for reconsideration. It may fairly be concluded, we suggest, that the four judges who have participated in the case are evenly divided on the propriety of affirmative relief to the Central roads.

ARGUMENT.

The respondents have grown bold. They argue, in effect, that they have uncovered a blind spot in the law. Having lost their contention that the parties had entered into an agreement governing the allocation of land grant revenue, respondents now assert that no power exists in the courts to compel them, as the settling roads, to account to the Central roads for the sums which come into their hands in payment of the transportation services performed by the Central roads.

Respondents themselves asked the District Court to resolve this controversy. (Complaint, subparagraph (a), R. 14.) The District Court did so. It resolved it against them. Now they argue that the court had power only to resolve it in their favor. Exploiting the windfall which they would receive from the action of the Circuit Court of Appeals in striking the affirmative relief granted petitioners, respondents insist that the sums received by them under the equalization agreements are beyond the reach of judicial process. Their argument permits of no other interpretation.

Both courts below have held against respondents' contention that the parties made an agreement governing the ownership and allocation of land grant revenue. That judgment defeated the sole contention by which respondents sought to avoid the plain terms of the Central roads' equalization agreements (See Complaint, R. 15, Subparagraph (c)). On the whole record the District Court then resolved the controversy by declaring that each group of roads had equalized and must bear the land grant deductions in its own territory, exactly as each had done in actual practice for a generation. The Circuit Court of Appeals eliminated this conclusion from the decree on the ground that the District Court "exceeded its jurisdiction" (R.

1795) and remitted the parties to "a proper suit in equity" (R. 1798).

Respondents do not suggest, of course, that while asking the District Court to resolve this controversy (See Complaint, Subparagraph (a), R. 14) they withheld evidence from that court which was necessary to its determination, and that they would present that evidence to the court in the "proper suit in equity" to which the parties are remitted by the judgment of the Court of Appeals. By that procedure respondents would have split their cause of action. What respondents are contending, therefore, is that *with all the evidence before it* the District Court could decide only their way, and that a decision for petitioners "was beyond judicial power."[1] As the Court will see, respondents are making it very plain that in their view the revenues which will be coming into their hands from this service for many months, are beyond the reach of the courts, and that they may distribute to the Central roads as much, or as little, or nothing, as may suit their pleasure.

Statement—Respondents' Brief In Opposition—Pages 1-2.[2]

Respondents' statement refers principally to the matter involved in respondents' own petition for certiorari, namely their effort to defeat the equalization agreements by the contention that the traffic officers of the two groups of roads had agreed to use Division Sheet 200-A as the basis for distributing land grant revenues, instead of the basis provided by the equalization agreements. That division sheet was issued for the sole purpose of placing in the hands of the auditors who make the interline settlements, a convenient statement

[1]Respondents' brief in opposition, page 11 and page 13.

[2]Reply is made to respondents' points in opposition under the same headings and in the same order in which they appear in the respondents' brief.

of the divisional basis of joint rates established by the Interstate Commerce Commission in the Southwestern-Official Divisions Case, 216 I. C. C. 687 (1936); 234 I. C. C. 135 (1939). As stated above, the District Court held that no agreement had been made that that division sheet was to supersede the equalization agreements as the basis for determining the ownership of revenues accruing under such agreements.

The method used by the War Department in arriving at the net land grant rate *applicable in each rate territory* is clearly stated in the opinion of the District Court, and respondents have never challenged a single statement of fact in that exhaustive opinion (R. 1677-8). Specifically, the Government ascertains the amount that the public at large would pay (*i. e.*, the commercial charge), for the transportation across Central Territory, deducts therefrom the land grant deductions accruing *in that territory*, and the remainder, the net rate for that service, is sent, as a matter of convenience, to the settling line, for distribution to the Central roads, to which it separately accrued. The same process is followed in computing the net rate applicable in Southwestern Territory. What the Central roads asked, and what the District Court held they are entitled to receive, is the net rate for the service performed by them, exactly as computed by the Government.

Questions Presented. Respondents' Brief in Opposition—Pages 2-3.

Although respondents are themselves seeking certiorari (in No. 552), they imply that the issues which petitioners ask this Court to review have been rendered moot by the repeal of the land grant laws. They do not take the responsibility of making a specific declaration to that effect because they know that it will be years before the interline settlements will be completed on this land grant

traffic. This is because the Government's General Accounting Office, which audits the amounts payable under the equalization agreements, is still working on the bills rendered by the railroads in the last quarter of 1944. Moreover, on a great volume of freight moving since 1941, it is common knowledge that final settlements will be deferred by disputes which have already arisen as to whether the traffic is of such a nature as to be entitled to land grant rates, and therefore, subject to the equalization agreements.

Nor does the repeal of the Land Grant Act have any bearing on the questions involving the application of the Federal Declaratory Judgments Act which arise out of the holding that the District Court was without jurisdiction (R. 1795) finally to resolve this controversy and remitting petitioners to "a proper suit in equity" (R. 1798), notwithstanding the fact that both parties asked for a declaratory judgment and offered all the evidence they had.

I.

Respondents' Brief In Opposition—Pages 4-5.

Respondents cite *Southern Railway Company* v. *United States* (1944), 322 U. S. 72, 88 L. Ed. 1144, but we do not perceive that it has the faintest relevance to this controversy. Of course each several land grant equalization agreement is a rate making agreement. The respondents not only recognized but insisted, until recently, that each such agreement establishes the reduced charge to which the agreeing road consents. It is an agreement by that road to accept, as its separate charge, the amount which would be paid by the public for the same service,—reduced, however, by certain land grant deductions which are identified in various "conditions" and "exceptions" embodied in the agreement. The sole purpose of such conditions and ex-

ceptions is to limit and govern the deductions to which the equalizing road consents.

We ask the Court to observe the critical and conclusive language of the respective agreements governing the distribution of revenue from a shipment moving over the lines of petitioner, Baltimore and Ohio, and respondent, Missouri Pacific, and to note how clearly each road has limited its equalization to the deductions in its own territory.

The equalization agreement of the Baltimore and Ohio provides:

> "The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive." (Ex. D-2, par. 3(c), R. 1252.) (The land grant deductions thus specified are all of those accruing in Central Territory in which petitioners operate.)

The equalization agreement of the Missouri Pacific provides that its "restrictive exceptions * * * shall not operate to restrict [its] equalization *to or from junctions with said Central Freight Association carriers.*" (The full text of these vital provisions is shown in the footnote.)[1]

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[1] "2. Conditions—

* * * * *

"(b) On traffic destined to and/or received from points on lines of other carriers this agreement is subject also to the exceptions in the agreements of each individual carrier forming part of the through route of movement, on file with The Quartermaster General, War Department, Washington, D. C.,

The District Court held on the whole record, including the interpretation which the parties had themselves placed upon the equalization agreements for many years, that each of the respective groups of roads had undertaken to bear the land grant deductions in their own territory. He required that in the future, as they had before the dispute arose, the parties make settlements on that basis. (Decree R. 1731.)

The excerpts quoted on page five of the brief in opposition are from a letter written in reply to a letter from a traffic officer of The Pennsylvania Railroad which appears in the record at pages 378 to 380. These letters were occasioned by the following circumstances: Until September of 1934, both groups of carriers interpreted the equalization agreements to require the Central roads to bear the deductions in Central Territory, and the Southwestern roads to bear the deductions in Southwestern Territory, and settled on that basis. There was no dispute.[1] The Cen-

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except as may be otherwise provided under the heading of Exceptions in paragraph 3 below.

"3. Exceptions—

• • • • •

"(d) On traffic moving to, from or through Central Freight Association territory the provisions of Condition (b) in paragraph 2 above are hereby waived to the extent that any restrictive exceptions contained in the agreements of Central Freight Association carriers on file with The Quartermaster General, War Department, Washington, D. C., **shall not operate to restrict equalization to or from junctions with said Central Freight Association carriers.**" (Emphasis added.) (R. 347-9.)

[1]Witness Wilson, Assistant Freight Traffic Manager of respondent Missouri Pacific, testified on cross-examination as follows:

"Q. When you changed your practice in 1934, following the change in the Eastern Lines' equalization agreements, you recognized at that time, did you not, that the matter of who bears the deduction is determined by equalization agreements, doesn't that follow from what you said?

"A. Well, I should think that is correct." (R. 242)

And in their reply brief in the Circuit Court of Appeals respondents make this revealing and significant statement:

tral roads then amended their equalization agreements for the reasons and with the result stated by the District Court. (Opinion, 1671-3) Two of the respondents claimed that the change in the equalization agreements warranted a departure from the traditional method of settlement (R. 1664), thus emphasizing their recognition of the fact that the settlements were governed by the terms of the equalization agreements. The Central roads immediately proposed to change the agreements again in such manner as to remove any possible ambiguity. The letters referred to above were written at that time. The War Department desired to hold restrictive provisions to a minimum and to have no part in policing the settlements between the roads. The officer in charge (R. 826) expressed the view that the settlements should be made on a territorial basis as in the past. The letter referred to the fact that there had been no dispute in the past, and expressed the hope that the matter could be worked out without further change in the equalization agreements. The Central roads then made a long effort to induce the Missouri Pacific and the St. Louis Southwestern to go back to the historic basis of settlement. When it failed, the Government, without any further objection, joined in agreements with the Central roads which plainly limit the deductions equalized by them to those accruing in Central Territory.

"On page 38 of their brief appellees state that for over thirty years prior to 1934 each of the parties to this case, regardless of which was the collecting or settling carrier, carried the land grant deductions in the territory served by it. Prior to September 1934 the Eastern Lines carried *restrictive exceptions* in their equalization agreements. Therefore, there were not 'wide open' equalization agreements between the two territories." (p. 9)

The current equalization agreements of the Central roads now contain "restrictive exceptions" which are unmistakable. It was precisely for the purpose of defeating those restrictive exceptions that counsel resorted to the contention that an agreement had been made which overrode and nullified the equalization agreements. Both courts below have held that that agreement was not made, and the present situation, therefore, by respondents' own admission, is exactly the same as it was prior to 1934 when respondents settled on the territorial basis.

II.

Respondents' Brief In Opposition—Page 6.

For the most part respondents' argument simply assumes the correctness of the Court of Appeals' modification of the District Court's decree. It *assumes* that the sums paid the settling road constitute a fund of common ownership, and *being so*, that petitioners "could not lawfully force upon these respondents a unilateral formula for division of joint revenues." (p. 6) There is no such common fund, and that argument begs the very question which this Court is asked to review. The theory that there is such a fund ignores the essential nature and function of the equalization agreements and would make meaningless and ridiculous the elaborate system of limiting conditions and exceptions by which each road has, from the beginning, controlled and fixed the measure of the reduced rate which it has accorded the Government. It ignores the fact, as the District Court found, and as we shall show this Court if permitted to do so, that each of the respondents insisted, prior to this suit, that every road had the right to determine for itself, and by its own equalization agreement, the measure of the reduced compensation which it would receive from this traffic. (See footnote, this brief, pages 10 and 11.)

III.

Respondents' Brief In Opposition—Pages 6-7.

Here, again, respondents beg the question which we ask this Court to decide, by assuming that the settling road has an undivided interest in every dollar of this revenue which comes into its hands for distribution,—they assume that there is a common fund to be divided.

As shown below, and as stated by the District Court, the Government computes *separately* the net land grant rate applicable in each rate territory. (Opinion, R. 1677-78.) It is the net rate, so computed, for the service over the Central roads, that was paid by the Government as a matter of convenience to the Southwestern roads for account of the Central roads, and which the latter are entitled to receive, as two of the respondents recognized for thirty years,—as respondent St. Louis and San Francisco recognized until September of 1942 and as the principal Southwestern roads recognize today. (Opinion of District Court, R. 1673, 1674.)

A full statement of the method of calculating the net rates is not embraced in the equalization agreements because it is derived from the land grant statute and War Department Circular 5-A. The statute provides:

> "Charges For Transportation By Land-Grant Railroads Subject to Regulation by Congress. Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and *shall not exceed 50 per centum* of the full amount of compensation, computed on the basis *of the tariff or lower special rates for like transportation performed for the public at large,* * * *." (43 Stat. 486; 10 U. S. C. A. Sec. 1375.)

Circular 5-A of the Office of the Quartermaster General, War Department, provides in part:

> "Where joint traffic is involved, the *net rates* or fares will be determined by dividing the through rates or fares between individual carriers comprising the route according to commercial division bases and *applying to the separate proportions accruing to land-grant railroads percentages published herein.*"[1] (Ex. A, R. 423.)

The commercial divisions are used in the process only for

[1]The percentages shown in Circular 5-A which are used in computing the net rates for the transportation service across Central Territory, express, in terms of percentages, the deductions specifically identified and equalized by petitioners in their respective equalization agreements.

the purpose for which they exist, namely, to break down the commercial rates, and thus obtain the amounts which the public pays for "like transportation performed for the public at large" in the respective rate territories. The net rate in each territory is then determined by reducing each such "separate proportion" by the land grant deductions accruing in that particular territory. (Opinion of District Court R. 1677-1678.)

IV.

Respondents' Brief In Opposition—Pages 7-8.

The Circuit Court of Appeals held categorically that net land grant rates created by several, separate equalization agreements between individual roads and the Government are *not* "joint rates." (R. 1794.) Nevertheless, it vacated the affirmative relief granted by the District Court on the ground stated by this Court in the *Terminal R. R. Association Case*,[1] that "The making of rates is a legislative and not a judicial function. The division of *joint rates* is also legislative in character." That case had nothing to do with net land grant equalization rates or the ownership of the revenues derived from such agreements. The making of net land grant rates by equalization agreements is not a legislative function. Such rates are purely voluntary, are created by agreements which are several and individual, and which create no commonly owned fund to be "divided" by legislative act or otherwise. The Interstate Commerce Commission never has any official knowledge of the existence of such agreements or rates. (Letters from Secretary of Commission, R. 698, 699.)

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[1] *Terminal R. R. Assn.* v. *United States*, (1924) 266 U. S. 17. In the paragraph immediately preceding the statement quoted from the *Terminal Case*, the Supreme Court said:

> "All rates have been set forth by tariffs; and the divisions of the charges among the participating carriers have been shown by their division sheets filed with the Interstate Commerce Commission."

The Court of Appeals held that the several equalization agreements "are entered into voluntarily by the railroads; and they may, insofar as the government is concerned, contain such conditions, restrictions and limitations as the railroads filing them desire to impose." (R. 1791.) As shown in our initial brief, however, its conclusion annuls that principle, and would make meaningless the elaborate system of exceptions and conditions by which each equalizing road has always fixed the measure of the reduced charge which it accords the Government.

Respondents' remaining discussion under this head consists of argument in support of its own petition, and a confusing reference to the computation of net land grant rates, a process which is clearly described in the opinion of the District Court.

V.

Respondents' Brief In Opposition—Pages 9-11.

Respondents assert that petitioners' "argument might have some point had these shipments moved under a combination of local rates." The term "combination of local rates," like the term "joint rates" refers to a type of commercial rates, i. e., rates published and filed with the Interstate Commerce Commission for application to freight shipped by the public at large. Technically, the net land grant rates created by the several equalization agreements of the Central and Southwestern roads do not constitute a combination of local rates, but if the writ is granted we shall show that if the net rates created by these equalization agreements, computed separately for each rate territory, are to be analogized to commercial rates at all, they partake more of the nature of a combination of local rates than of joint rates. The net charge is computed separately for each territory, and could be paid separately. For convenience the Government lumps the separate sums together and remits to the terminal road, exactly as does

the commercial shipper whose freight moves on a combination of locals. In neither instance is there any matter of "divisions" involved. A road does not force a "divisional formula" upon its connection when it publishes a local rate which is used in combination with another rate of the same character. Nor does an equalizing road do so when it makes an agreement with the Government that it will only equalize the land grant deductions in its own territory, and thus fixes the measure of the reduced rate which it will accord the Government. Throughout the long history of such agreements every equalizing road has changed the scope of its equalization time and again. Never before was it suggested that in doing so it was imposing a "divisional formula" upon its connections.

VI.

Respondents' Brief In Opposition—Pages 11-12.

If the Central roads cannot themselves control the measure of the reduced charge which they will accord the Government for the transportation of Government freight over their own lines, through their individual equalization agreements with the Government, but must accept whatever compensation respondents may agree in their mercy to let them have, then it is manifest, we submit, that respondents are denied their statutory right under Section 22 of the Interstate Commerce Act.[1] In their current equalization agreements the Central roads have done everything in their power to exercise their right under Section 22 to control the measure of the reduced rate which they are willing to accord the Government on this freight.

VII.

Respondents' Brief In Opposition—Pages 12-14.

We assume that respondents will scarcely deny that on each shipment of this Government freight in respect to

[1] "That nothing in this part shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, * * *." (U. S. Code, title 49, Sec. 22.)

which they serve as the terminal and collecting roads, they do actually receive sums of money, in some amount, which the Government pays for the transportation services over the Central roads, and which respondents must, therefore, hold in trust for the Central roads. On a record which contained all the evidence bearing upon the ownership of those sums which either side could present in support of their respective prayers for declaratory judgment, the District Court resolved the controversy. The declaration that in so doing the District Court "exceeded its jurisdiction" (R. 1795) is that of the Court of Appeals, not of petitioners.

Again in this section of their brief, respondents beg the essential question by assuming that the sums received by them for distribution constitute a fund of common ownership which the courts cannot reach unless it be established that respondents agreed to give some of it up. Here, again, therefore, respondents are stating in the plainest language that a decree declaring their liability to account to the Central roads for the sums held by them is "beyond judicial power." (p. 13.) Of course, they are not admitting that they split their cause of action and that they have other evidence as to the basis for distribution which would be offered in "a proper suit in equity." They are asserting that with all relevant evidence before the Court the sums received by them are beyond the reach of judicial process.

We earnestly ask the Court to grant the writ.

Respectfully submitted,

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October 15, 1946.